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Supreme Court of the United States

October Term, 1957

No. 469

CONSTANTINE MACRIS,

Petitioner,

against

SOCIEDAD MARITIMA SAN NICOLAS, S.A., and PETMAR AGENCIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES, FOR THE SECOND CIRCUIT

JACOB RASSNER,
Attorney for Petitioner.

THOMAS F. FRAWLEY,
on the Brief.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES, FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Constantine Macris, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit, entered on June 17, 1957.

Official Report of the Court Below

The decision of Lawrence E. Walsh, Judge of the District Court for the Southern District of New York, dated December 31, 1955, is reported in 19 Fed. Rules, Decisions, page 397 (Appendix A).

The decision of the Circuit Court of Appeals for the Second Circuit has not been officially reported (Appendix B).

Jurisdiction

The opinion of the court below was filed on June 17, 1957.

Jurisdiction to review this decision is predicated upon Title 28, U. S. C., Section 1257.

Original jurisdiction is based upon diversity of citizenship.

Questions Presented

When in the course of maritime employment aboard a merchant vessel a seaman suffers serious and permanently disabling injuries as a direct consequence of performing services under the direction of his superior, are the consequences of such injuries to be borne by the vessel or by the injured person; it being a natural hazard and one of the risks incidental to maritime service for a seaman to be exposed to the danger of injury in the performance of his duties aboard a vessel often without any provable cause of unseaworthiness or negligence?

Should a seaman thusly injured be left without remedy, under the ancient doctrine of assumption of risk or does present day progress, in merchant shipping, impel the interpretation of legal liability so as to place financial responsibility on the industry, in the service of which such seaman became disabled, through no fault of his or the vessel's, while performing services in the furtherance of the ship's business?

Does the refusal of a trial court to permit an amendment of the complaint so as to include the original injuries in an action predicated upon an aggravation of such injury constitute a denial of due process of law?

Reasons for Granting the Writ

Prior to the decision by Judge Learned Hand in the case of *Keen* v. *Overseas Tankship Corporation*, 194 Fed. (2) 515, ship owners were absolved from liability for the consequences of personal injuries suffered by a seaman, in the absence of negligence or unseaworthiness.

Judge Hand expressed the view that modern shipping industry warranted a departure from the old principle of law of assumption of risk incidental with the employment and expressed the view that industry should bear the consequences of the injuries suffered in such industry.

The refusal of a trial court to permit an amendment of a complaint, predicated upon an aggravation of an injury, to include the original accident as part of the cause of action, seems to be a denial of due process of law, within the provisions of the Fourteenth Amendment, and which supports a petition for a writ of certiorari so as to guaranty to seamen a full opportunity to assert all facts incidental to his crippling injuries.

Statement

There is no issue of fact herein contained.

The facts are clearly and accurately set forth in the opinion of Judge Walsh, including the footnotes (Appendix A).

Argument

The present interpretation of applicable law is that obedience to an order which "unduly" exposes a seaman to injury relieves the seaman of the charge of contributory negligence and imposes a liability on the ship owner. *Socony-Vacuum Oil Co., Inc.* v. *Smith*, 305 U. S. 424.

Our courts have made considerable progress in giving legal safeguards to provide maintenance and cure irrespective of the manner of the happening of an accident or the occurrence of an illness during the maritime employment, but have not expressed any view except that of Judge Learned Hand in the *Keen* case, *supra*, holding a ship owner liable for the consequences of injury suffered in obedience to a direct order except where the order was improvident.

Stare decisis does not answer the question herein presented, as to whether liability would lie in the event that the order was not improvident.

It would appear that progress calls for consideration by this Honorable Court of the thoughts expressed by Judge Leanerd Hand in the *Keen* case, *supra*, that industry and not the injured man should be called upon to bear the consequences of disabling injuries, innocently suffered, while carrying out the services of his employment under a specific direction of his superior, without any fault on anyone's part.

It is frequently impossible to demonstrate unseaworthiness or fault so as to constitute proof of unwarranted exposure.

Modern progress warrants clarification of the law, so as to assure to a seaman recovery for injuries suffered while obeying the order of the superior, irrespective of whether the order was wisely or improvidently issued. All duties aboard a ship are hazardous, and no one can draw a distinctive line of demarcation between a provident and an improvident order.

Under the present state of the law, such obedience relieves the seaman of the charge of contributory negligence, but, at the same time, renders immunity to the shipowner for the consequences of the disabling effects of the injuries justly suffered.

As to the question of amendments of the complaint, it would appear that this Honorable Court has laid down a principle of law that all the facts, and the facts and justice only, should determine a decision in a case, and not technical considerations. *Pope & Talcott* v. *Hawn*, 346 U. S. 406.

This would seem particularly true where the evidence of an accident and the manner of its occurrence was testified to by the plaintiff, under circumstances where defense counsel had been advised that such evidence might or might not be offered and where defense counsel was not taken by surprise, seems to warrant the granting of a motion to amend the complaint so as to include the original accident, in a cause predicated on aggravation of conditions suffered in the very accident in question.

The learned trial court, as a substantial part of the basis for denying the plaintiff's motion, at the close of the plaintiff's case, to amend the pleadings to conform to the proof, concluded that there was no applicable law which would support a decision granting damages to an injured seaman for injury suffered while obeying a specific order of his superior without proof of negligence or unseaworthiness on the part of the ship owner.

It would thus seem that although the court was not sympathetic to the attitude adopted by the seaman's trial counsel, the trial court nevertheless very judiciously considered the merits of the amendment and apparently would have granted the motion, despite his personal feelings, if there were *stare decisis* to support a recovery for damages resulting from injuries suffered while performing ship's services in obedience to his superior's direct order.

The court below approved the trial court's decision, but, likewise, gave very serious consideration to the merits of the case, and concluded that there was no prejudicial error

because the seaman could not have recovered on the proposed amended complaint, in the absence of proof of unseaworthiness or negligence.

The trial court stated, in its footnote, as follows:

> "Indeed there was no proof of lack of seaworthiness of the vessel or negligence of defendants. Plaintiff was Second Mate. While tying up to the pier in Bremen, plaintiff was in charge of the crew on the stern, one line had been put ashore and was taken to the niggerhead of the winch. A second line was put ashore and it was necessary to heave in the slack by hand. Plaintiff, at the direction of the master, joined with the crew in pulling on the line and in the course of this work sustained his hernia. There was no claim that the crew was inadequate. The claim of fault insofar as the causation of the injury was concerned apparently is that plaintiff was required to do something which was not the duty of the Second Mate, a claim supported only by plaintiff's own opinion."

The Court below stated, at page 1677:

> "The denial of the motion to amend was not prejudicial in any event, however, for the simple reason that the evidence failed to show any breach of duty to Macris on the part of the defendants prior to the ship's arrival in Baltimore. There was no proof that unseaworthiness of the vessel or the defendants' negligence was a cause of Macris' original injury at Bremen."

It is obvious, from the foregoing, that the impelling reason by both the trial court and the Appellate Court below, was that mere obedience to a superior's order, in the absence of proof of negligence or unseaworthiness, does not constitute a basis for liability for injuries suffered during the performance of such duties.

Conclusion

In view of the fact that all work aboard a ship entails some degree of hazard and that the line of demarcation between an improvident order and a proper order is impossible of differentiation, uniformity of decision is completely absent, and one seaman, in one tribunal, may have a recovery on the identical facts which may be considered inadequate in another court.

In the interest of uniformity of decision in Admiralty, and in the interest of substantial justice, we respectfully submit that there is a special and important reason warranting the exercise of the judicial discretion by the United States Supreme Court considering the questions herein presented.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

THOMAS F. FRAWLEY,
on the Brief.

Appendix A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CONSTANTINE MACRIS,

Plaintiff,

against

SOCIEDAD MARITIMA SAN NICOLAS, S. A. and PETMAR AGENCIES, INC.,

Defendants.

Appearances:

JACOB RASSNER, Esq., Attorney for Plaintiff, 15 Park Row, New York City, New York.

RENATO C. GIANLORENZI, Esq., Attorney for Defendants, 50 Broad Street, New York City, New York.

OPINION

WALSH, *D. J.*

This was an action by a seaman against his employer to recover for disability resulting from effects of anesthesia administered in an operation to repair a hernia. He claimed that the hernia had been aggravated by acts and omissions of the defendants during a voyage from Baltimore, Maryland to Japan and return to San Francisco, and that this aggravation made necessary two operations instead of one and thereby caused the disability complained of. At the close of the case, his claim was dismissed for failure to

prove any change of condition during the voyage. Thereafter, he sought to amend his complaint to state a claim for the original hernia and its aggravation during the voyage prior to arrival in Baltimore.[1] This motion was denied and plaintiff now seeks reargument.

Plaintiff is a Greek national; defendant Sociedad Maritima San Nicolas, S. A., a Panamanian Corporation; and defendant Petmar Agencies, Inc., a Delaware Corporation. The vessel on which plaintiff was employed is of Liberian registry.

Plaintiff was employed in Greece as Second Mate. From there the vessel sailed to Bremen, Germany; Santos, Brazil; and then to Baltimore, Maryland. In Bremen, plaintiff sustained a hernia. He was examined there and in Santos. In Baltimore he signed off the vessel for return to Greece for treatment, but, faced with a few days detention at Ellis Island awaiting the ship to carry him to Greece, he, at his own request, signed back on and made the trip from Baltimore to Japan and back to this country.

Plaintiff limited his claim to aggravation of his condition after his re-employment in Baltimore. By so doing he believed that he strengthened his contention that this Court should assume jurisdiction of the subject matter and that the Jones Act was applicable. This position was maintained consistently throughout the trial. Plaintiff did offer proof of the prior events at Bremen and Santos, but this proof was received solely upon the issue of defendants' duty subsequent to re-employment in Baltimore—not as to possible fault of the defendants in Bremen or between Bremen and Baltimore. Defendants objected to its receipt for any purpose. Plaintiff acquiesced in the Court's limitation. He did not at that time seek to amend his complaint.

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[1] At the close of his case, before the ruling of the Court, plaintiff's counsel moved perfunctorily to conform the pleadings to the evidence but declined to state in what particulars amendment was sought

Appendix A

Plaintiff's motion to amend, at the close of the trial, was made under Rule 15(b), as a motion to conform the pleadings to the evidence. This was not a proper case for amendment under Rule 15(b) because proof had not been taken as to the claim attempted to be added to the complaint, except as incidental to other matters.[2] Even to this extent it was taken not with the express or implied consent of the defendants but over their objection.

With respect to amendments under this subdivision Professor Moore says:

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[2] Indeed there was no proof of lack of seaworthiness of the vessel or negligence of defendants. Plaintiff was Second Mate. While tying up to the pier in Bremen, plaintiff was in charge of the crew on the stern. One line had been put ashore and was taken to the niggerhead of the winch. A second line was put ashore and it was necessary to heave in the slack by hand. Plaintiff, at the direction of the master, joined with the crew in pulling on the line and in the course of this work sustained his hernia. There was no claim that the crew was inadequate. The claim of fault in so far as the causation of the injury was concerned apparently is that plaintiff was required to do something which was not the duty of the Second Mate, a claim supported only by plaintiff's own opinion.

After the plaintiff's injury was disclosed, the master had him examined by a doctor in Bremen. The doctor found that the plaintiff had the beginning of a hernia on both sides. An immediate operation was not recommended. At the next port of call,-Santos, Brazil, plaintiff was again examined by a doctor who recommended the wearing of an elastic belt which was purchased for plaintiff and worn until he arrived in Baltimore. When examined in Baltimore both by a private physician and the Marine Hospital, plaintiff was found to have a double hernia ready for operation but not one for which operation was emergent. He was found fit for light duty.

Neither the medical records nor the other proof gives any basis for concluding that the treatment and examination the plaintiff had received to that date was inadequate or improper. The wisdom of withholding an immediate operation was not litigated, although one of plaintiff's medical experts did testify that an early operation would have been much simpler than the one plaintiff ultimately underwent.

> "The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment. * * * ". 3 Moore's Federal Practice 846-47.

Simms v. *Andrews*, 10 Cir., 118 F. 2d 803, 807, held that amendment of a pleading under comparable circumstances was not proper. The court said:

> " * * * When the Trustee amended his pleadings, however, he did not amend them to conform to the proof, but set up an entirely new defense to the claim of the government. For the first time he pleaded the statute of limitations. This was not one of the issues in the original trial. Any evidence introduced at the time of the trial tending to bear on the statute of limitations was incidental to the question of notice and was not introduced for the purpose of this defense. An amendment after judgment stating a new cause of action or a new defense is not permissible under the guise of conforming the pleadings to the proof and the court was right in striking the amendments from the records and reinstating the original judgment. * * * ".

See also *United States* v. *City of Brookhaven*, 5 Cir., 134 F. 2d 442, 446; *Nordstrom* v. *McAllister Brothers, Inc.*, S. D. N. Y., 9 F. R. Service, 15b 1, Case 5. The proposed new claim, not having been an issue tried by express or implied consent of the parties, was not an amendment authorized by Rule 15(b).

Appendix A

The amendment sought is perhaps within the power of the court under subdivision (a) of Rule 15,[3] but even if it were within the power of the court under either subdivision (a) or subdivision (b), this was not a case in which the power should have been exercised. Plaintiff's failure to move to amend in advance of trial was deliberate and not excusable. Plaintiff's trial counsel had been retained nine months before trial. The case had been sent out for trial and settlement negotiations abandoned one week before the trial actually commenced. Even busy trial counsel had had adequate opportunity to familiarize himself with the case and to make his final decision as to the theory on which he intended to proceed. None of the testimony at the trial was unanticipated.

Plaintiff's counsel claims that the amendment should be allowed because defendants' counsel was not surprised. Plaintiff's counsel had in fact badgered his opponent with the *possibility* of this amendment and with others which he never requested[4] but he had never given notice of an intent to amend. The discussion of possible amendments was merely an incident in a war of nerves designed to keep defendants and the court guessing as to what plaintiff's claim would ultimately prove to be. These are tactics a court should decline to aid or abet.

Plaintiff's motion for reargument of the denial of leave to amend is denied.

There remains the question of the amount to which plaintiff is entitled as maintenance and cure. It is my

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[3] It is said that this power may be exercised even after trial. 1 Barron and Holtzoff Federal Practice and Procedure 888, Section 446.

[4] For example, during settlement conference plaintiff's counsel also threatened to amend the complaint to charge defendants with alleged inadequate treatment by the Marine Hospital as their agent. At the opening of the trial he disclaimed any such theory of liability

conclusion that he should receive $8.00 a day for a period from July 17, 1952 when he left the vessel, until January 5, 1953, except for the period from July 31, 1952 to September 24, 1952, when he was a patient in the Marine Hospital at Staten Island. After January 5, 1953 he was not entitled to maintenance and cure because he failed to return to the Marine Hospital for further treatment as directed.

This leaves, as a possible basis for future action, his claim based upon a corrective operation and recuperation therefrom if one is had.

It is so ordered.

Dated: December 31, 1955.

LAWRENCE E. WALSH,
United States District Judge.

Appendix A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

—o—

CONSTANTINE MACRIS,

Plaintiff,

against

SOCIEDAD MARITIMA SAN NICOLAS, S. A. and PETMAR AGENCIES, INC.,

Defendants.

—o—

Appearances:

JACOB RASSNER, Esq., Attorney for Plaintiff, 15 Park Row, New York, New York.

RENATO C. GIALLORENZI, Esq., Attorney for Defendants, 50 Broad Street, New York, New York.

MEMORANDUM

WALSH, *D. J.*

The Court: I will tell you, let me make my comments and that will give you both something to shoot at. Let me start off with the motion addressed to the amendment of the pleadings. I am going to deny that motion. In the first place, I think the plaintiff has proceeded primarily on the basis of what had happened between Baltimore and New York anyhow. In the second place, I don't see any foundation, surprise or otherwise, which would justify changing the pleadings at this late date.

I am going to the merits, and I think I must conclude that there is no basis for recovery here except for maintenance and cure, and I will try to trace my reasoning.

The hernia occurred in Bremen. I don't think, under the pleadings, that what occurred before Baltimore is important except in so far as it explains what the various parties did in Baltimore; but I don't think, in any event, there was any proof here of any negligence or unseaworthiness of the vessel in Bremen. I think that a second mate on any vessel must be expected to be able to pick up a line and heave on it or lift it, and whether that is his ordinary duty or not, he cannot say that he has been put to some unanticipated or unreasonable task which would make the vessel liable if, through no one's fault, he suffers a hernia.

What gives me the most trouble, and I think that underlies fundamentally my conclusion, is that I think his hernia was just about as bad when he got to Baltimore the first time as when he got back to Staten Island for treatment. I think it did progress and get worse between Bremen and Baltimore, and at Baltimore it was described as a double hernia and we have a recommendation for an operation, not emergent but that it should be had as soon as time permits.

I don't recall anything in the record, and I listened carefully, and I have gone over my notes day by day, and I have been over them all again at the conclusion of the trial, I don't recall any proof that it got worse between Baltimore and his return to New York, other than the plaintiff's subjective feeling that he was getting worse. I don't recall anything which shows that the condition changed between Baltimore and New York. Dr. Hymes speculated that because the plaintiff was able to work when he went to Korea and needed an operation when he got back to New York that there must have been a change. Frankly, I think Dr. Hymes' speculation or his conclusion was not on very firm ground. Of all the experts, he was the only one whom I felt was a little bit reckless in some of his answers, and I don't give any weight to his opinion in that respect, that he speculates on that basis that the hernia worsened during the voyage. And I am not giving any weight to plaintiff's own subjective feeling that it got

worse, and I don't recall anything else in the record on the subject.

The doctor who examined him here for the defendant said that even when he arrived in New York, just before his operation, he was capable of continuing to work. In fact, I cannot see anything different in his appraisal of the hernia and that which was obtained at the Baltimore Marine Hospital and before Dr. Kelley in Baltimore.

Because of that, we don't get to the more difficult questions of the foreseeability of his bladder injury as a sequel of the delay in operation. Both Dr. Hyslop and Dr. Keating say that there really is no correlation, at least science has not been able to develop one; Dr. Keating says there is no correlation between successive operations and this kind of sequel, and Dr. Hyslop said there is no correlation between the amount of this drug administered and this kind of sequel. Dr. Keating did say there was a correlation between the amount of other types of drugs and comparable sequelae. However, this whole question would confront me only if I had concluded there was some change in the physical condition of the hernia between Baltimore and Staten Island. And if I had reached this point, then I would like briefs from counsel as to liability for unforseeable injury, but I don't think we get to that point, so I am not going to bother you or burden you with the request for briefs.

As to the nature of plaintiff's injury, I think that this man suffered from an atony of the bladder but, with the greatest respect for the defendants' expert, I don't attribute its cause to chronic prostatitis. I follow Dr. Hyslop's conclusion that it somehow resulted from the anesthesia administered on the second operation.

Because of my conclusion that there was no significant change in plaintiff's condition after his re-employment in Baltimore, under the present pleadings, it really doesn't make much difference whether we are under the Jones Act or the general maritime law. Until I heard Captain Draca-

tos testify that at the time of this voyage he and his brother were part owners of this vessel and that there was thus ownership outside of the Marchessini family, I had intended to follow plaintiff's contention and treat this as though it were an American defendant and to hold that the action was properly under the Jones Act. Now, in view of the fact that others had a beneficial interest in the vessel, I think I will give greater request to the form of the corporate setup and treat it as a Panamanian owner in fact as well as in form and, therefore, I will apply the general maritime law.

In any event plaintiff is entitled to maintenance and cure to the point of maximum cure. Actually, we don't have much in the record to help me compute that. Certainly, as to his sexual difficulty, Dr. Hyslop and experts on both sides, said that he hasn't reached his point of maximum cure and he is entitled to it. I will leave that to computations to be submitted to me by counsel or however you think best.

Just one thing before we leave. This is out of place and it goes back to Baltimore. As a matter of fact, I haven't reached that point, but I would like to make clear one thing: I do not believe that the plaintiff was overreached. I don't give weight to that part of his testimony which suggested that he was. Again, I am not sure that it is a question of dishonesty. I feel that the plaintiff at times has manifested a simple-mindedness and a lack of maturity in his appraisal of events, for example relying on gossip of soldiers as to the adequacy of hospital conditions in Pusan and, also in his own suspicion as to what went on with respect to the Immigration officials in Baltimore. I don't see anything in the record which justifies a conclusion that defendants tried to overreach him. I think they honestly tried to get him prompt medical attention and that they were certainly willing to return him to Greece for an operation, as he wished. Although, perhaps, they weren't ready to meet every whim he had, they tried to accommodate him, certainly to all reasonable lengths.

Appendix A

The waiver, regardless of its nature as a defense in itself, satisfied me that defendants were not trying to get plaintiff to continue his service with them at all costs. Its language shows a pretty tough attitude towards the plaintiff not any dishonest attempt to minimize his impaired physical condition in order to get him to continue in the ship's service. It was pretty blunt. It made it clear that he could come along on the voyage if he really wanted to but at his own risk. This was spelled out to the point of warning him that his compensation would be reduced to the extent that others had to perform his duties for him.

I realize that in giving legal effect to the waivers by seamen, we look at them with the greatest care and even suspicion. I think this waiver would stand up under such scrutiny but, because of my view on the underlying question of liability, I don't have to decide this question. The waiver does, however, reflect on the plaintiff's credibility to the extent that it shows that there was no overreaching in Baltimore and it supports the credibility of the ship's captain to that extent.

(Discussion between Court and Counsel.)

Mr. Giallorenzi: I would like something noted on the record about these motions. As I understand it the Court gave a decision, that you are not reserving decision?

The Court: No, I haven't reserved decision.

Mr. Giallorenzi: You have given your decision?

The Court: I have given my decision. Mr. Rassner thinks I am in error on certain points. He wants to, by brief or reargument, show me those errors, and I have said, "By all means, do so." He wants until two weeks after he gets the minutes. I would like to have it sooner than that.

(Further discussion between Court and Counsel.)

LAWRENCE E. WALSH,
United States District Judge.

Dated: October 31, 1955.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 258—October Term, 1956.

(Argued March 12, 13, 1957 Decided June 17, 1957.)

Docket No. 24058

—o—

CONSTANTINE MACRIS,

Plaintiff-Appellant,

—v.—

SOCIEDAD MARITIMA SAN NICOLAS, S.A. and PETMAR AGENCIES, INC.,

Defendants-Appellees.

—o—

Before:

HINCKS, STEWART and LUMBARD,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge*.

Plaintiff appeals from a judgment, entered after trial without a jury, awarding him maintenance and cure, but dismissing his cause of action brought under the Jones Act, 46 U. S. C. A., § 688, and the general maritime law for personal injuries allegedly caused by his employer's negligence and by the unseaworthiness of the vessel on which he was employed. Affirmed.

Appendix B

JACOB RASSNER, New York City (Harvey Goldstein, of counsel), *for plaintiff-appellant.*

RENATO C. GIALLORENZI, *New York City, for defendants-appellees.*

STEWART, *Circuit Judge*:

Constantine Macris was originally hired as second mate of the S.S. EURYVIADES in November, 1951, at Piraeus in his native Greece. Two months later, when the vessel was being moored at Bremen, Germany, he "felt a pain" while engaged with other members of the crew in hauling in a line. The ship's captain sent him to a physician in Bremen, who informed him that he had a hernia and advised him to see a doctor at the next port.

From Bremen the vessel sailed to Santos, Brazil, where Macris was examined by a physician and provided with a truss. The ship then proceeded via Trinidad to Baltimore, Maryland, arriving there in April, 1952. At Baltimore Macris was again examined, this time both by a private physician and at a United States Public Health Service Hospital. He was found "fit for light work not involving heavy lifting," but an operation was recommended. He signed off the vessel, and arrangements were made for his transportation on a passenger ship scheduled to leave eighteen days later for Greece, where the operation could be performed.

Macris changed his mind, however, because he did not want to be detained at Ellis Island while awaiting passage home. He signed back on as second mate of the EURYVIADES on April 7, 1952. From Baltimore the ship sailed to Korea, returning to California in the summer of 1952. In California Macris again signed off the vessel for the purpose of having an operation. He traveled to New York at his

employer's expense, and underwent two operations at a hospital there in August of 1952. Afterwards Macris suffered physical impairment, allegedly caused by the administration of an anaesthetic in the course of the second operation. He remained in an out-patient status, but failed to return for further treatment after January 5, 1953, although directed to do so.

Macris' cause of action for negligence and unseaworthiness was based upon a clear cut and narrowly defined theory. The complaint was silent as to what had transpired before Macris decided to resume his employment in Baltimore. It alleged that he "signed articles" as second mate there on April 7, 1952. Recovery was sought upon the ground that his impaired physical condition at the time of his employment in Baltimore had been aggravated by the defendants' negligence and by the unseaworthiness of their vessel during the ensuing three month period. The claim was that this aggravation made necessary two operations instead of one and thereby caused his subsequent disability.

After a five day trial the district judge found that this cause of action had not been proved. The court found as a matter of fact that Macris' condition had not deteriorated during the period between April 7, 1952, when he signed the articles in Baltimore, and July 7, 1952, when he left the ship in California.

It is not contended here that the district court was in error in finding that the essential allegations of the complaint were not proved. The contention is rather that the trial court erroneously denied the plaintiff's motion to amend his complaint to conform to the proof under Rule 15(b) Fed. Rules of Civil Procedure.

At the trial the history of what had occurred from the time Macris was originally employed in Greece was received

in evidence, despite the narrow scope of the complaint. Defense counsel repeatedly objected to the admission of any evidence of events prior to Macris' reemployment in Baltimore, and the evidence was admitted by the trial judge only for the limited purpose of showing "the course of dealings between the parties before the hiring" at Baltimore.

At the close of the plaintiff's case, his counsel made a perfunctory motion "to amend the pleadings to conform to the proof," but failed to point out any variance between the evidence and the pleadings, or any change in the theory of the plaintiff's cause of action. When the trial judge inquired as to the reason for the motion, counsel replied, "Frankly, I don't see any actual need at the moment." The court denied the motion with leave to renew it at a later time. The motion was not renewed until after the court had announced an adverse decision. Only then did counsel indicate that he desired to broaden his pleadings to assert the defendants' liability for the original hernia in Bremen and for its aggravation during the voyage from Bremen to Baltimore.

The Court denied the motion upon the ground that no such issues had been tried by the express or implied consent of the parties, pointing out that "proof had not been taken as to the claim attempted to be added to the complaint" except "upon the issue of defendants' duty subsequent to reemployment in Baltimore," and that the defendants had objected to its receipt for any purpose. The court pointed out that plaintiff's counsel had had ample opportunity to familiarize himself with the facts of the case and had deliberately chosen the theory on which he intended to proceed. The court emphasized that plaintiff's counsel had "badgered" his opponent with the possibility of such an amendment as part of a "war of nerves," but had refrained from asking to amend until the case had been lost on the plaintiff's original theory.

Appendix B

Under the circumstances disclosed by the record, the trial court was clearly within its discretion in denying the motion to amend. *Simms* v. *Andrews*, 118 F. (2d) 803, 807 (10 Cir., 1941); *Wheeler* v. *West India SS Co.*, 205 F. (2d) 354 (2 Cir., 953), cert. den. 346 U. S. 889; *United States* v. *City of Brookhaven*, 134 F. (2d) 442, 446 (5 Cir., 1943).[1]

The denial of the motion to amend was not prejudicial in any event, however, for the simple reason that the evidence failed to show any breach of duty to Macris on the part of the defendants prior to the ship's arrival in Baltimore. There was no proof that unseaworthiness of the vessel or the defendants' negligence was a cause of Macris' original injury at Bremen. There was no proof that aggravation of his condition between Bremen and Baltimore, was so caused. There was no proof of any negligent failure to provide Macris with medical treatment either before or after the vessel stopped at Baltimore, and there was affirmative evidence, and an affirmative finding that there had been no such failure.

The remaining issues merit little discussion.

The district court was not in error in awarding maintenance and cure only through January 5, 1953, because after that date Macris failed to return to the hospital for further treatment as directed. Generally a refusal by a seaman of proffered care and treatment discharges the obligation of maintenance and cure. *Bailey* v. *City of New York*,

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[1] "The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment. * * *" 3 Moore's Federal Practice 846-47.

135 F. (2d) 427 (2 Cir., 1946); *The Saguache*, 112 F. (2d) 482 (2 Cir., 1940). Exceptions to this rule exist, when reasonable grounds for refusing care are shown. *Luth* v. *Palmer Shipping Corp.*, 210 F. (2d) 224 (3 Cir., 1954). But here the evidence was insufficient to remove the case from the operation of the general rule.

The contention that Macris was entitled to wages for the period after he left the EURYVIADES in California until the end of her voyage in Italy more than a year later is clearly without merit. His employment ended when he voluntarily signed off at Richmond, California, on July 7, 1952. He had no right to wages he would have earned had he continued aboard as second mate for another year. *Liciliano* v. *California Sea Products Co.*, 44 F. (2d) 784 (9 Cir., 1930); *Wahler* v. *Alaska SS Co.*, 91 F. Supp. 261 (W. D. Wash., 1950); *Raymond* v. *The Ella S. Thayer*, 40 Fed. 902 (N. D. Cal., 1887).

The judgment is affirmed.